Yugarajan a/l Letchimanasamy & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL NOS K-05(M)-235–04 OF 2018 AND K-05(M)-237–04 OF 2018
HAMID SULTAN, HADHARIAH ISMAIL AND ABU BAKAR JJCA
15 JUNE 2020

Criminal Procedure — Conviction and sentence — Drug trafficking — Trial judge invoked both presumption of mens rea possession and presumption of trafficking under Dangerous Drugs Act 1952 against accused persons facing joint charge of trafficking — Whether invocation of double presumptions rendered conviction and sentence of accused unlawful — Whether prosecution's failure to make agent provocateur available to defence as witness gravely prejudiced defence's case as he was the only one who could confirm or contradict their version of events — Whether prosecution's failure to make witness available as well as trial judge's failure to address and rule on issue of common intention/prior concert contained in the charges were fatal omissions entitling accused to be acquitted and discharged

The appellants were sentenced to death by the High Court after being found guilty of jointly committing two charges of trafficking in 222.1g of methamphetamine, 96.3g of heroin and 20g of monoacetylmorphine at a jetty area in Kuala Kedah in Kedah. They were charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') read together with s 34 of the Penal Code. According to the prosecution's evidence, a police team acting on information received was waiting in ambush at the jetty area when they noticed the appellants arriving in a car driven by the first appellant. As soon as the car stopped, an undercover policeman ('Sgt Saiful') approached the car, spoke to the appellants and then opened the door behind the driver to inspect something that was in the backseat of the car. Thereafter, Sgt Saiful gave a pre-arranged signal to the ambush party who moved in and arrested the appellants. The leader of the police party, PW2, testified that he found a bag in the backseat of the car containing an envelope which contained the drugs in question. At the end of the prosecution's case, the trial judge found the appellants had custody/control of the drugs in question and invoked both the presumption that they had mens rea possession of the drugs (pursuant to s 37(d) of the DDA) as well as the presumption that they were trafficking (pursuant to s 37(da) of the DDA). With that, the trial judge ruled that the prosecution had proved a prima facie case and called for the defence. The appellants' story was that while they were on their way to the jetty, a man carrying two bags asked them for a lift. The appellants agreed, the man got into the back seat of the car and later got off near the jetty area. The appellants said that minutes later, a Malay man (Sgt Saiful) approached them and asked whether the man who had taken a lift in their car had given them anything.

When the appellants replied in the negative, the Malay man, who had by then noticed a bag in the back seat of the car, opened the back door, checked the bag and then closed the door and walked away. Within minutes, the appellants were surrounded and arrested by the police officers. The trial judge did not believe the appellants' story and held that they had failed to rebut both the statutory presumptions of mens rea possession and trafficking and convicted and sentenced them after finding the prosecution had proven its case beyond reasonable doubt. In the instant appeal, the appellants argued that their convictions and sentence should be set aside because: (a) the trial judge's invoking of the double presumptions for possession and trafficking was unlawful; (b) the prosecution's failure to make Sgt Saiful (who was never called as a witness) available to the defence had gravely prejudiced the appellants' case; and (c) the trial judge's failure to address and make a ruling on the issue of common intention contained in the charges was fatal.

Held, unanimously allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellants:

(1) The court was bound by the Federal Court's decision in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 that the presumptions of possession and trafficking in, respectively, s 37(d) and 37(da) of the DDA, could not be invoked and applied together to find an accused guilty. Although the appellants' case was decided by the trial court before *Alma Nudo* was decided, the decision of the Federal Court (not being expressed to have prospective application only) applied retrospectively to render invalid and unlawful the application of the double presumptions, thereby rendering the convictions and sentences of the appellants invalid (see paras 28–30, 36–37 & 39).

(2) The prosecution's failure to make Sgt Saiful available to the appellants entitled them to an acquittal. He was a central figure in the unfolding of events in this case. He was an important witness for the appellants and the failure to make him available attracted adverse inference against the prosecution in that it strengthened the notion that the prosecution was suppressing evidence that was unfavourable to it. The appellants were seriously prejudiced by being deprived of the opportunity to question Sgt Saiful about the conversation they had with him at the material time. Sgt Saiful's non-availability raised a reasonable doubt in the prosecution's case and made it unsafe and unfair to find the appellants guilty of the charges against them. The prosecution's explanation that Sgt Saiful could not be made available because he had already retired from the police force and was apprehensive about his safety if he testified in this case was unsustainable because to accept such an excuse would be to encourage retirees not to testify in court for fear of their lives. This would affect the administration of justice (see paras 43–46 & 48).

(3) It was incumbent on a trial judge to make a finding whether the element of common intention contained in a charge had been proven. It was fatal if that was not done. The grounds of judgment in the instant case made no references or findings with respect to this important element of the charges. Whether the appellants had acted with common intention or prior concert was an issue that was never decided. The failure to state whether common intention had been proven, and the reasons for it, rendered the decision to convict and sentence the appellants undefendable (see paras 49, 51 & 54).

(4) There was no justification to even find the appellants guilty of the offence of mere possession of the drugs in question, because without Sgt Saiful's evidence, even a charge of mere possession could not be taken to have been proved beyond reasonable doubt as there was no way of ascertaining whether the appellants were speaking the truth about the man who had allegedly taken a lift in their car and left a bag containing the drugs behind (see paras 55 & 59).

[Bahasa Malaysia summary

Perayu telah dijatuhkan hukuman mati oleh Mahkamah Tinggi setelah didapati bersalah secara bersesama terhadap dua pertuduhan mengedar metamfetamin seberat 222.1g, 96.3g heroin dan 20g monoacetylmorphine di sebuah kawasan jeti di Kuala Kedah, Kedah. Mereka didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang dibaca bersama dengan s 34 Kanun Keseksaan. Menurut keterangan pihak pendakwaan, pasukan polis yang bertindak berdasarkan maklumat yang diterima sedang menunggu secara hendap di kawasan jeti ketika mereka melihat perayu tiba dengan sebuah kereta yang dipandu oleh perayu pertama. Sebaik sahaja kereta berhenti, seorang polis yang menyamar ('Sgt Saiful') menghampiri kereta tersebut, bercakap dengan perayu dan kemudian membuka pintu di belakang pemandu untuk memeriksa sesuatu yang berada di tempat duduk belakang kereta. Selepas itu, Sgt Saiful memberi isyarat seperti yang dirancang kepada pasukan penyerbu yang bergerak masuk dan menangkap perayu. Ketua pasukan polis, PW2, memberi keterangan bahawa dia menjumpai beg di tempat duduk belakang kereta yang berisi sampul surat yang mengandungi dadah yang dimaksudkan. Pada akhir kes pendakwaan, hakim perbicaraan mendapati para perayu memiliki hak penjagaan/kawalan terhadap dadah tersebut dan menggunapakai dua anggapan bahawa mereka mempunyai mens rea pemilikan dadah tersebut (menurut s 37(d) ADB) serta anggapan bahawa mereka mengedar (menurut s 37(da) ADB). Dengan itu, hakim perbicaraan memutuskan bahawa pihak pendakwaan telah membuktikan kes prima facie dan memanggil untuk pembelaan. Kisah perayu adalah bahawa ketika mereka dalam perjalanan ke jeti, seorang lelaki yang membawa dua beg meminta mereka untuk menumpang. Perayu bersetuju, lelaki tersebut masuk ke tempat duduk belakang kereta dan kemudian turun berhampiran kawasan jeti. Perayu

mengatakan bahawa beberapa minit kemudian, seorang lelaki Melayu (Sgt Saiful) menghampiri mereka dan bertanya adakah lelaki yang menaiki kenderaan mereka telah memberi mereka apa-apa. Ketika perayu menafikannya, lelaki Melayu tersebut, yang ketika itu melihat beg di tempat duduk belakang kereta, membuka pintu belakang, memeriksa beg dan kemudian menutup pintu dan berjalan pergi. Beberapa minit kemudian, perayu telah dikepung dan ditangkap oleh pegawai polis. Hakim perbicaraan tidak mempercayai kisah perayu dan menyatakan bahawa mereka gagal menanggas anggapan undang-undang mens rea terhadap pemilikan dan pengedaran dan disabitkan dan dijatuhkan hukuman setelah mendapati pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah. Dalam rayuan semasa, perayu berpendapat bahawa sabitan dan hukuman mereka harus diketepikan kerana: (a) hakim perbicaraan dalam menggunapakai anggapan berganda terhadap pemilikan dan pengedaran secara tidak sah; (b) kegagalan pihak pendakwa membawa Sgt Saiful (yang tidak pernah dipanggil sebagai saksi) bagi pihak pembelaan telah memprejudiskan kes perayu; and (c) kegagalan hakim perbicaraan untuk menangani dan membuat keputusan mengenai isu niat bersesama yang terkandung dalam petuduhan tersebut adalah mustahak.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan sabitan dan hukuman serta membebaskan dan melepaskan perayu:

(1) Mahkamah terikat dengan keputusan Mahkamah Persekutuan dalam *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 bahawa anggapan pemilikan dan pengedaran, masing-masing, s 37(d) dan 37(da) ADB, tidak dapat dibenarkan dan diguna pakai bersama untuk menyabitkan tertuduh. Walaupun kes perayu telah diputuskan oleh mahkamah perbicaraan sebelum *Alma Nudo* diputuskan, keputusan Mahkamah Persekutuan (tidak pernah dinyatakan hanya mempunyai kesan prospektif) digunapakai secara retrospektif untuk menjadikan penggunaan anggapan berganda itu tidak sah dan menyalahi undang-undang, sehingga menjadikan sabitan dan hukuman perayu tidak sah (lihat perenggan 28–30, 36–37 & 39).

(2) Kegagalan pendakwaan untuk tidak menawarkan Sgt Saiful kepada perayu memberikan hak kepada mereka untuk dilepaskan. Beliau adalah saksi utama dalam perkembangan peristiwa dalam kes ini. Beliau adalah saksi penting bagi pihak perayu dan kegagalan menawarkan beliau telah membawa kepada adverse inference terhadap pihak pendakwaan kerana ini memperkuat lagi anggapan bahawa pihak pendakwaan menyembunyikan bukti yang tidak menyokong kes mereka. Perayu telah diprejudiskan kerana tidak diberi kesempatan untuk menyoal Sgt Saiful mengenai perbualan antara mereka pada waktu yang material. Ketiadaan Sgt Saiful menimbulkan keraguan yang munasabah dalam kes pendakwaan dan menjadikannya tidak wajar dan tidak adil untuk

mendapati perayu bersalah atas tuduhan terhadap mereka. Penjelasan pihak pendakwaan bahawa Sgt Saiful tidak dapat dipanggil kerana beliau sudah bersara dari pasukan polis dan berasa khuatir tentang keselamatannya jika beliau memberi keterangan dalam kes ini tidak boleh disokong kerana untuk menerima alasan tersebut akan mendorong pesara untuk tidak memberi keterangan di mahkamah kerana takut akan keselematan mereka. Ini akan mempengaruhi keupayaan keadilan (lihat perenggan 43–46 & 48).

(3) Tanggung jawab hakim perbicaraan untuk membuat penemuan sama ada elemen niat bersesama yang terkandung dalam pertuduhan dapat dibuktikan. Ianya adalah fatal sekiranya perkara itu tidak dilakukan. Alasan penghakiman dalam kes semasa tidak membuat rujukan atau penemuan berkenaan dengan unsur penting pertuduhan tersebut. Sama ada perayu telah bertindak dengan niat bersesama atau didorong adalah isu yang tidak pernah diputuskan. Kegagalan untuk menyatakan sama ada niat bersesama telah dibuktikan, dan alasannya, menjadikan keputusan untuk menjatuhkan hukuman dan menyabitkan perayu tidak dapat dipertahankan (lihat perenggan 49, 51 & 54).

(4) Tidak ada justifikasi bahkan untuk mebuat dapatan bahawa pihak perayu bersalah atas kesalahan memiliki dadah tersebut, karena tanpa keterangan Sgt Saiful, bahkan pertuduhan memiliki tidak dapat dianggap telah terbukti tanpa keraguan yang munasabah kerana ada tidak ada cara untuk memastikan sama ada perayu bercakap benar mengenai lelaki yang didakwa menaiki kenderaan mereka dan meninggalkan beg yang mengandungi dadah (lihat perenggan 55 & 59).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (folld)
Ho Yee Onn v PP [2020] 2 MLJ 789; [2020] 2 CLJ 491, CA (refd)
Krishna Govind Patil v State of Maharashtra AIR 1963 SC 1413, SC (refd)
Liew Chee Hong v PP [2007] 7 MLJ 699, CA (refd)
Masoumeh Gholami Khaveh v PP [2013] 5 MLJ 688, CA (refd)
Morgan Raj Ravi & Anor v PP & other appeals [2020] 3 CLJ 240, CA (refd)
Ong Teik Thai v PP [2017] 4 MLJ 421; [2016] 7 CLJ 1, FC (refd)
PP v Asnawi bin Yusuf [2011] 4 MLJ 16; [2012] 3 CLJ 41, CA (folld)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)
Tang Teck Seng & Anor v PP [2018] 4 MLJ 617, CA (refd)
Tran Thi Tat v PP [2019] 6 MLJ 81; [2019] 8 CLJ 69, CA (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 37A
Penal Code s 34
Penal Code [IND] s 34

S Parameswaran (K Selava with him) (S Param & G Thila) for the appellants.
Ku Hayati Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abu Bakar JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court which convicted and sentenced both the appellants here for two offences of trafficking in dangerous drugs. Although there are other issues which will be explained, the core issue that arose in this appeal is whether the conviction and sentence against the appellants could still be upheld when the learned judicial commissioner ('JC') had used double presumptions both for possession and trafficking of the drugs in finding the appellants guilty. The learned JC had used the presumption for possession under s 37(d) of the Dangerous Drugs Act 1952 ('the Act') and s 37(da) of the Act for presumption of trafficking. The prosecution admirably had also been candid in conceding indeed the learned JC did apply double presumptions against both appellants.

[2] We find that because both presumptions had been used and the plain admission of the prosecution as indicated above, the position whether the appellants could be convicted and sentenced for the charges per se becomes much clearer. This written judgment will address the core issue raised as well as other relevant issues in deciding whether the charges could be sustained.

THE CHARGES

[3] The first charge against both appellants reads as follows:

> Bahawa kamu bersama-sama pada 22/1/2015, jam lebih kurang 11.30 pagi di laluan keluar masuk Jabatan Laut Malaysia, Jeti Kargo Kuala Kedah, di dalam Daerah Kota Setar, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat 222.1 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) *Akta yang sama dan dibaca bersama* seksyen 34 Kanun Keseksaan.

[4] The second charge against both of them states as folows:

Bahawa kamu bersama-sama pada 22/1/2015, jam lebih kurang 11.30 pagi di laluan keluar masuk Jabatan Laut Malaysia, Jeti Kargo Kuala Kedah, di dalam Daerah Kota Setar, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya seberat 116.3 gram iaitu jenis Heroin seberat 116.3 gram dan Monoacetylmorphine seberat 20.0. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B (1) (a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

THE PROSECUTION'S CASE

[5] PW2, the police officer who headed the raiding team, gave evidence that on the date mentioned in the charges, he had received information from one ASP Saiful Muzir (not called as a witness) on a possible drug trafficking transaction to be executed on the same date and at the location as also mentioned in the charges. The information given to PW2 was that an Indian man arriving in a black coloured Toyota Vios ('car') would be involved in the tracfficking.

[6] The team comprising of more than twenty police officers broke up in several groups. They stationed themselves around the vicinity where the transaction was supposed to take place. Not long after that, the car pulled over. PW2 then saw Detective Sergeant Saiful Bahari bin Zin ('Sgt Saiful') (not called as a witness) walked towards the car. There is no dispute by the prosecution nor defence that Sgt Saiful was an agent provocateur in this case. As Sgt Saiful arrived next to the car at the driver's seat, PW2 saw the window screen on the driver's side of the car was wind downed. After a short moment, walking from the front, Sgt Saiful went to open the backdoor behind the driver's seat. He was seen slightly bending down as if he was inspecting something at the backseat. He then closed the door and lifted the cap he was wearing as a signal that the drugs were in the car. Sgt Saiful then walked away from the car.

[7] After PW2 saw the signal, he gave instructions through the walkie-talkie for the team to move to the car. PW2 walked quickly towards the car and identified himself as a police officer, flashing his authority card. The driver of the car immediately reversed the same but collided into a lorry belonging to the team. The car was by then already surrounded by the team members.

[8] PW2 found two Indian males seated at the front seats. Both were arrested. Personal documents recovered indicated the driver of the car was the first appellant and the second appellant was seated next to him.

[9] PW2 further testified he found a bag at the backseat of the car. In the

bag he found an envelope and in the envelope he found some transparent packets. In the packets he found substance which he suspected to be methamphetamine and heroin.

[10] PW2 then brought the appellants, substance and other items seized to Ibu Pejabat Kontinjen to be handed to PW4, the investigation officer ('IO').

[11] Later PW4 handed the substance to PW1 who was the chemist for analysis. PW1 found the substance to be methamphetamine weighing 222.1g, considered as dangerous drug under the the Act after testing. The remaining substance was also tested and it was found to be heroin weighing 96.3g and monoacetylmorphines weighing 20g. Both also considered as dangerous drugs under the Act.

FINDINGS OF THE HIGH COURT AT END OF PROSECUTION'S CASE

[12] Based on the evidence of PW1 the chemist, the learned JC found that the drugs recovered in the car were dangerous drugs pursuant to the First Schedule of the Act.

[13] The learned JC also found that the appellants had control of the drugs found in the car based on the evidence of PW2. As such the learned JC at the end of the prosecution case used the presumption under s 37(d) of the Act that states as follows:

> In all proceedings under this Act or any regulation made thereunder —
>
> (a) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

[14] Following the above provision, the learned JC deemed that the appellants had possession of the drugs and consequently be deemed to have knowledge of the same.

[15] The learned JC also deemed the appellants had been trafficking the drugs found and invoked s 37(da) of the Act that reads:

> any person who is found in possession of ... grammes or more in weight of ... otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug ...

[16] In essence at the end of the prosecution case, the learned JC considered the evidence adduced based on maximum evaluation as required by the Federal

Court's case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and found the prosecution had proven a prima facie case. Having found a prima facie case, the learned JC called for the defence of both appellants.

DEFENCE

[17] The appellants gave evidence, that they went to the place they were arrested as the second appellant wanted to buy ferry tickets to Langkawi. On their way, a man by the roadside hailed their car near the jetty. The first appellant stopped and asked what the man wanted. The man requested a lift to the jetty. They agreed to the request and the man got in the car and sat at the backseat. He was slinging a bag and holding another bag. The first appellant drove a short distance near the jetty and the man got off there.

[18] A short while later, the first appellant saw a Malay man walking towards him when he was still at the driver's seat. He wind downed his window screen and asked what the Malay man wanted. The Malay man asked him whether a man had taken a lift in the car. He answered yes. The Malay man also asked whether the man who took the lift had given anything. The Malay man took a peek at the backseat and went to open the backdoor. He then opened a bag at the backseat and asked whether the bag belongs to the first appellant. The first appellant said no. The Malay man asked who was the man that took the lift and the appellant answered he did not know who he was. The Malay man then closed the door and moved away from the car.

[19] The second appellant then asked the first appellant whose bag was that. The first appellant answered he did not know who is the owner of the bag but the bag might belong to the man who took the lift. The appellants said afterwards they were discussing how to return the bag to the man. Suddenly they were surrounded by several men, who later they knew to be police officers. Both of them were then arrested. The first appellant denied the man who took the lift was fictitious. He also said he could not call that man as a witness as he was a stranger. He denied the bag was his and he had no knowledge of the drugs in the bag.

FINDINGS OF THE HIGH COURT AT END OF DEFENCE'S CASE

[20] Essential, the learned JC did not accept the version of the appellants as to what transpired on that fateful day. The defence of the appellants was rejected by the learned JC.

A **[21]** The learned JC did not believe that a man had been allowed to take a lift in the car shortly before the appellants were arrested. The learned JC also did not believe that the same man had left a bag containing the drugs in the car.

B **[22]** In the learned JC's grounds of judgment, it is stated that in Her Ladyship's final analysis, both appellants had failed to rebut both presumptions for possession and trafficking on the balance of probabilities.

C **[23]** As a consequence, the learned JC found the prosecution had proven the case beyond reasonable doubt at the end of the defence's case. Therefore, the learned JC convicted both appellants for both charges of trafficking in the dangerous drugs. As a result, both appellants were sentenced to death by the learned JC.

D GROUNDS OF APPEAL

[24] Although there are several grounds of appeal by the appellants, in the light we took of this appeal, we are of the opinion it is unnecessary to allude to all of them in this judgment.

E

[25] We are of the considered view that none is more crucial than the ground the learned JC erred in applying double presumptions in finding the appellants guilty. In fact as will be explained, this ground alone is sufficient to determine whether the charges against the appellants could be sustained. The appellants
F in this regard argued the learned JC was legally mistaken in using double presumptions for possession and trafficking as indicated earlier.

[26] Another important ground of appeal to our understanding is the contention that the failure of the prosecution to ensure the availability of Sgt
G Saiful to be called as a witness for the appellants had raised adverse inference on the part of the prosecution. This failure had also caused injustice to the appellants as their version of what had happened could not be tested and verified since Sgt Saiful is not made available to be called as a witness.

H **[27]** Another ground of appeal of significance is that the learned JC totally failed to address the issue regarding common intention as stated in the charges. As this is an important aspect of the charges, the appellants submitted the learned JC's decision to convict and sentence them without making a finding on this issue clearly could not stand.

I

OUR DECISION

[28] As indicated, we are of the opinion that the most material point of contention that will determine the outcome of this appeal rests on the

undisputed fact the learned JC had used double presumptions as explained earlier. In this regard it cannot be denied that we are bound by the Federal Court's decision in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780. This case held that double presumptions ie for possession pursuant to s 37(d) of the Act cannot be applied together with trafficking of drugs pursuant to s 37(da) of the Act. This case held as follows:

> ... a plain reading of the wording in sub-ss (d) and (da) does not permit the concurrent application of both presumptions in the prosecution of a drug trafficking offence.

[29] The rational for this is seen when the Federal Court further held as follows:

> To invoke a presumption of trafficking founded not on proof of possession but on presumed possession based on proof of mere custody and control, constitued a grave departure from the general rule that the prosecution was required to prove the guilt of an accused beyond a reasonable doubt.

[30] Based on this decision, we are without doubt that the learned JC with respect, was in error in using both presumptions in finding the appellants guilty.

[31] In this regard we also took into account two decisions of the Court of Appeal in *Morgan Raj Ravi & Anor v Public Prosecutor & other appeals* [2020] 3 CLJ 240 and *Tran Thi Tat v Public Prosecutor* [2019] 6 MLJ 81; [2019] 8 CLJ 69 that followed *Alma Nudo* to set aside the convictions for the charges for trafficking of the drugs.

[32] At this stage we should also address the submission of the learned deputy public prosecutor ('DPP') in this appeal that since the High Court decided the present case before *Alma Nudo,* double presumptions could still be used to convict and sentence the appellants. The learned DPP further argued that before *Alma Nudo,* double presumptions could be used because of s 37A of the Act that reads:

> Notwithstanding anything under any written law or rule of law, a presumption may be applied under this part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[33] That essentially means the learned DPP is arguing that *Alma Nudo* must not be applied retrospectively but only prospectively. This according to the learned DPP should make it permissible for the learned JC to apply double presumptions without infringing the principle in *Alma Nudo.*

[34] First it is apposite to point out that with the advent of *Alma Nudo,* s 37A of the Act as narrated above is no longer constitutional. The Federal Court in this case held as follows:

> Accordingly, s 37A was unconstitutional for violating art 5(1) read with art 8(1) of the FC. The impugned section was hereby struck down.

[35] That still begs the question, should the ruling against double presumptions be applied also retrospectively or only prospectively in view of *Alma Nudo*? Would cases applying double presumptions before *Alma Nudo* still be considered good law? In answering these questions, we find assistance in the Federal Court's case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* referred earlier. This case not only states the requirement in deciding a prima facie case but also explains whether a law formulated in a decided case should also be retrospective or only prospective, the very issue that confronts this court in the present appeal. The Federal Court on this point gave a lengthy explanation and held as follows:

> *But a decision of this court — or indeed of any court — is retrospective in effect unless a specific direction of prospectivity is expressed.*
>
> As was stated by the Court of Appeal in its judgment in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298; [2002] 3 CLJ 521:
>
> *It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect.* In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v Walker* [1965] 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 LNS 28, where, at pp 320–321, Abdoolcader SCJ said:
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> The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v. Walker* [1965] 381 US 618 (at p 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LC Golak Nath v State of Punjab & Anor AIR* [1967] SC 1643 (at pp 1666–1669). The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be

adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England, this doctrine has been recognized by the House of Lords by necessary implication in the Practice Statement (Judicial Precedent) Vol 123 DLR (Third) 554 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1966. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v Jeromnimon* [1981] 2 WLR 80, Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

Although *Linkletter v Walker* and *PP v Dato' Yap Peng* concerned the constitutionality of statutes, the same principle applies to decisions in other areas of the law. This appears sufficiently from the cases of *Jones v Secretary of State for Social Services and Another Appeal* [1972] AC 944 and *Choice Investments Ltd v Jeromnimon and Another Appeal* [1981] 2 WLR 80, both of which are referred to in the passage above quoted.

The Federal Court could, therefore, if it had so wished, have declared its decision in Muhammed bin Hassan to be of prospective effect only. Had it done so, then cases decided under the former misconception about the way in which ss 37(d) and (da) of the Act were to be applied would not have been available for correction on appeal. But that is not what happened. The decision in Muhammed bin Hassan consequently falls under the general doctrine of retrospectivity and it therefore applies to the present case. We therefore are bound to apply it.

Very recently, the House of Lords has had to consider the doctrine of prospective overruling in *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41. The House was agreed that it had the power to overrule prospectively. Lord Nicholls of Birkenhead explained the operation of prospective overruling in terms which are relevant to the instant appeal. He said:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v. Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'nonretroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.
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> Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.
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> Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.
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> *So too here. When the learned judge at first instance tried the respondent and handed down his decision, Muhammed bin Hassan was yet to be decided. However, the judgment of this court in Muhammed bin Hassan had been handed down before the respondent's appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal, in accordance with the principles adverted to by Lord Nicholls in Spectrum Plus, to apply Muhammed bin Hassan to this case. It is in this way that the declaration of the common law by a superior court operates retrospectively.*
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> *In our judgment, Mokhtar Sidin JCA, speaking for the majority, was therefore correct in applying Muhammed bin Hassan and in holding that the High Court had misdirected itself.* (Emphasis added)

[36] Relying on the above case, which after all we are bound to follow, the decision of *Alma Nudo* on the illegality of double presumptions likewise applies retrospectively too as the Federal Court in *Alma Nudo* did not say that its decision shall only be applicable prospectively. That would mean, in the context of the present appeal, the learned JC's application of double presumptions would also be invalid nor appropriate despite having done so before *Alma Nudo*.

[37] Obviously the learned JC should not be faulted for using double presumptions at the point Her Ladyship decided the case. But as shown, *Alma Nudo* would still render Her Ladyship's decision unlawful. As the learned JC erred in applying double presumptions for possession and trafficking of the drugs, we are of the view that the appellants could not be convicted and

sentenced based on the charges against them.

[38] A slightly different approach was taken by the Court of Appeal in the case of *Ho Yee Onn v Public Prosecutor* [2020] 2 MLJ 789; [2020] 2 CLJ 491 but producing the same result that *Alma Nudo* would still be applicable even when the trial court had used double presumptions before *Alma Nudo*. Delivering judgment, Her Ladyship Mary Lim JCA said:

> First, on the matter of the Federal Court decision in *Alma Nudo Atenza v Public Prosecutor*. The learned judge had indeed invoked both presumptions under s 37(d) and (da) of the Act. We are of the firm view that the Federal Court decision applies to the present appeal and the concession of the learned DPP supports this conclusion. *We are obliged to apply the law as it stands and as decided by the apex court; it is not a matter of retrospective effect but an application of the law as it stands to all pending proceedings. The instant appeal remains a pending proceeding for so long as it is still processing through the appellate process and is thus subject to the rigours of inter alia the doctrine of stare decisis and the principle of prospective overruling. See Veheng Global Traders Sdn Bhd v AmGeneral Insurance & Anor And Another Appeal* [2019] 7 CLJ 715; *Ling Peek Hoe & Anor v Ding Siew Ching & Another Appeal* [2017] 5 MLJ 385; [2017] 7 CLJ 641; *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] CLJ Rep 284; [1987] 1 CLJ 550. On this ground alone, the appeal must be allowed and the conviction and sentence be set aside. (Emphasis added)

[39] Thus based on the authorities highlighted, the action taken by the learned JC in applying double presumptions alone would mean the charges preferred against the appellants cannot be sustained. An acquittal and discharged for the appellants against the charges would be appropriate considering the facts and law in this regard.

[40] We would now address the ground of appeal pertaining to the non-availability of Sgt Saiful to be called as a witness by the appellants.

[41] It should be recalled that Sgt Saiful without dispute both by the prosecution and defence, acted as an agent provocateur in this case. It is also not disputed that the prosecution had offered Sgt Saiful to the defence to be called as a witness. It is also not denied that despite offering Sgt Saiful as a witness to the appellants, the prosecution eventually failed to make available Sgt Saiful to be called.

[42] Based on the facts above, first we should point out when anyone is offered by the prosecution to be called as a witness, it is incumbent for the prosecution to ensure the presence of that person to the defence. This is decided by the Court of Appeal in *Public Prosecutor v Asnawi bin Yusuf* [2011] 4 MLJ 16; [2012] 3 CLJ 41 where it was held:

A When witnesses were offered by the prosecution to the defence at the end of the case for the prosecution, it was the bounden duty of the prosecution to avail those witnesses for the defence. *If in the exercise of that duty, the prosecution failed to fulfil that obligation, the accused must be acquitted.* (Emphasis added.)

B **[43]** Following the above case, the failure of the prosecution to make available Sgt Saiful simply means the appellants must also be accordingly acquitted for the charges against them.

C **[44]** It gets more daunting for the prosecution in this respect because as stated, there is no dispute that Sgt Saiful acted as agent provocateur, culminating in the arrest of the appellants. Further, as narrated, Sgt Saiful was one of the central figures in the unfolding of events in this case. He is an important witness for the appellants. In this regard the need to ensure the availability of an agent provocateur as a witness is shown in the Federal Court's case of *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 where it is held:

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... if a person is an agent provocateur, he is required to give evidence in court as a prosecution witness and if he is not called he has to be offered and made available to the defence. *Failure to comply with this requirement will attract the application of adverse inference under s 114(g) of the Evidence Act 1950 ('EA') against the prosecution's case.* (Emphasis added.)

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F **[45]** In acknowledging the above decision, likewise, the failure to make Sgt Saiful available will only attract adverse inference against the prosecution in this case. The adverse inference is, if Sgt Saiful is made available, he might confirm the appellants' version that a man had taken a lift in the car and might have left the bag containing the drugs in the car without the knowledge of the appellants. Conversely, Sgt Saiful might deny the purported conversation when he met the appellants regarding that man and the bag. By not making available Sgt Saiful it only strengthens the notion that the prosecution is suppressing evidence unfavourable to them. If there are more than one inference, it is trite that an accused should be given the most favourable inference. This is explained in the Court of Appeal's case of *Liew Chee Hong v Public Prosecutor* [2007] 7 MLJ 699 as follows:

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It is trite law that when more than one inference can be drawn from a set of facts, then the court must adopt the inference most favourable to an accused person.

I **[46]** The failure to ensure the availability of Sgt Saiful had seriously prejudiced the appellants in their defence. Without Sgt Saiful, the appellants were deprived the opportunity to pose questions to him as to what was conversed in the car. Indeed the non-availability of Sgt Saiful had raised a reasonable doubt on the case of the prosecution. As a result it would not be safe nor fair to find the appellants guilty for the charges against them.

[47] Similarly in the Court of Appeal's case of *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688 the failure to make available a witness after being offered to the defence drew the following finding:

> The appellant's right to a fair trial had been compromised as a result of the failure on the part of the prosecution to secure the attendance of Amin which had the effect of rendering the conviction very unsafe. The appellant might thereby have lost a chance which was fairly opened to her of being acquitted and that there had been occasioned a failure or a miscarriage of justice.

[48] The prosecution had explained that Sgt Saiful could not be made available as he had already retired from the police force and that he was apprehensive of his safety if he is required to give evidence in this case. With respect, we cannot accept this explanation. For us to accept such explanation would result in encouraging retirees not to testify to court for fear of their own lives. This would affect the administration of justice by the courts.

[49] In respect of the third ground of appeal that the learned JC failed to address the issue of common intention, we have scrutinised the grounds of judgment of Her Ladyship. Regrettably from the same, we could not see any findings or even any references on this important element of the charges. Reading the grounds of judgment of the learned JC, it is obvious whether the appellants acted with common intention was never decided even at the end of the trial.

[50] The Federal Court in the case of *Ong Teik Thai v Public Prosecutor* [2017] 4 MLJ 421; [2016] 7 CLJ 1 quoted the Indian Supreme Court's case of *Krishna Govind Patil v State of Maharashtra* AIR 1963 SC 1413, where the following observation about s 34 of the Indian Penal Code was made regarding common intention (similar to our s 34 of the Penal Code):

> It is well settled that common intention within the meaning of the section implied a pre-arranged plan and the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede the act constituting the offence. *If that be so, before a court can convict a person under Section 302 read with Section 34, of the Indian Penal Code, it should come to a definite conclusion that the said person had prior concert with one or more other persons, named or unnamed, for committing the said offence* ... (Emphasis added.)

[51] Taking note of the above quotation, the learned JC cannot possibly convict the appellant for the charges because Her Ladyship never made any conclusion whatsoever that there was prior concert between the appellants to commit the offences as per the charges. It is incumbent on the trial court to make a finding whether the element of common intention has been proven whenever this element is mentioned in the charge. It is fatal if this is not done.

[52] In the Court of Appeal's case of *Tang Teck Seng & Anor v Public Prosecutor* [2018] 4 MLJ 617 it is held as follows:

> We agreed with the submission of learned counsel for the appellants that His Lordship must explain the basis of his finding that there was common intention. There was a brief discussion at the defence stage but that, with respect, is no good. The discussion must be at the prima facie stage.

[53] First, the above case again illustrates the importance of making a finding about common intention whenever it becomes an issue, especially at the prima facie stage. Second, obviously the position in the above case is not that dire compared to the present appeal. This is because in the present appeal, the learned JC did not make any finding on common intention at all, even at the defence stage.

[54] The failure to state whether common intention had been proven and the reasons for it, renders the decision to convict and sentence the appellants undefendable.

[55] Having found the charges of trafficking of the drugs could not be maintained, we are also not inclined to say there is evidence for the offence of mere possession of the drugs instead. We could not do this as the non-availability of Sgt Saiful had put a reasonable doubt even on the issue of possession of the said drugs. As explained since Sgt Saiful cannot be called, it cannot be ascertained whether the appellants were speaking the truth when it is said the man who took the lift had left the bag containing the drugs in the car.

CONCLUSION

[56] The application of double presumptions by the learned JC in this case is contrary to the law. This ground alone is sufficient to merit the appeal.

[57] The failure of the prosecution to make available a potential witness after offering the same to the defence had also prejudiced the appellants.

[58] The learned JC also did not make a finding on common intention which is a material component of the charges against the appellants. The cases of the appellate courts highlighted on this point indicate that this must be done.

[59] Further, there is no justification even to find at least the appellants could be guilty for the offence of mere possession of the drugs. This is because without the evidence of Sgt Saiful, even for this possible offence, it cannot be concluded that it is proven beyond reasonable doubt.

[60] Bearing in mind all the reasons alluded in this judgment, we are unanimous that the appeal should be allowed. Hence it is only appropriate that the conviction and sentence by the trial court against the appellants be set aside. The appellants are accordingly acquitted and discharged.

Appeal unanimously allowed; conviction and sentence set aside; appellants acquitted and discharged.

Reported by Ashok Kumar